A **SUBRAMANIAM PARAMASIVAM**

v.

COURTS MAMMOTH BHD & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: S1-23-64-2005]
11 MARCH 2010

C ***DEFAMATION:*** *Damages - Claim by solicitor against former clients - Clients' letter of termination and letter of complaint - Whether words capable of being defamatory - Whether words referred to solicitor - Publication of - Whether established - Whether cause of action in defamation recognised by law where complaint made to a professional disciplinary authority is dismissed - Factors to consider - Whether clients had bona fide grievance when letters issued*

D ***DEFAMATION:*** *Defences - Qualified privilege - Defence disputed on grounds of malice - Whether particulars of facts set out - Whether solicitor bears burden to proof malice - Rules of the High Court 1980, O. 78 r. 3*

E The plaintiff, an advocate and solicitor, claimed damages against the defendants for defamation. The defendants were the plaintiff's former clients. The claim was premised on the words or innuendos contained in: (i) the first defendant's Solicitor's Letter of Termination ('letter of termination') and (ii) the first defendant's letter of complaint against the plaintiff to the Advocates & Solicitors Disciplinary Board ('letter of
F complaint') wherein the said complaint was eventually dismissed by the board. It was alleged that the offending words in the letter of termination were "any and all money paid by COURTS to you with respect to the 226 files which has been wrongfully apportioned, appropriated and/or expended". On the other hand, the allegations in the
G letter of complaint were in relation to the refusal to provide status reports and statement of accounts and extended to his conduct and practise which are wholly inappropriate of an advocate and solicitor. The defendants relied on the defence of qualified privilege. The issue that arose for consideration herein was, *inter alia*, whether the law recognises
H a cause of action in defamation cases where a complaint made to a professional disciplinary authority was dismissed.

Held (dismissing the plaintiff's claim with costs):

(1) The words in the letter of termination and the letter of complaint
I did not speak well of the plaintiff. The words and innuendos were clearly capable of being defamatory. Besides, in both instances, the plaintiff was referred to by his name. As such, it was not disputed that the words referred to the plaintiff. (paras 6 & 7)

(2) There had been no publication to a third party in respect of the letter of termination which was addressed to the plaintiff. Without publication to a third party, there is no cause of action in defamation. On the other hand, the letter of complaint was written to the Advocates & Solicitors Disciplinary Board. Thus, there was prima facie publication to a third party. (paras 8, 10 & 11)

(3) Order 78 r. 3 of the Rules of the High Court 1980 ('RHC') operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must serve a reply by giving particulars of the facts and matters from which malice is to be inferred. Thus, the plaintiff bears the burden to proof malice. The effect of O. 78 r. 3 RHC is to require particulars of malice to be pleaded so that the truth and correctness of the particulars relied upon can be checked and verified. (paras 14 & 20)

(4) The plaintiff had failed to file a reply to the statement of defence and to put together a plea of malice as an answer to the defence of privilege as required under O. 78 r. 3 RHC. Instead, the plaintiff relied upon his statement of claim wherein he had alleged malice. There was no particulars of facts relied upon from which a finding of malice may be inferred or concluded although the word 'malice' was used. As such, the plaintiff failed to invoke malice as an answer to the defence of privilege. (paras 19, 20 & 21)

(5) The threat of litigation would intimidate persons with *bona fide* complaints from making a complaint and deny the public their right of protection from unprofessional professionals. This is a far greater harm to the public interest than to professionals having to defend themselves in a disciplinary forum. (para 25)

(6) There was no evidence to suggest that the defendants did not believe their own complaint and was misusing the complaint procedure to the Advocates & Solicitors Disciplinary Board for any other ulterior motive. As such, the complaint to the said board remained *bona fide* at the time it was made and provides no cause of action by its dismissal. Hence, the defendants did have a *bona fide* grievance at the time the letter of termination and the letter of complaint were issued. (paras 27 & 29)

Case(s) referred to:

Abdul Aziz Jelani & Anor v. Peter Chua Swee Lai [2000]2 CLJ 402 HC ***(refd)***

Abu Samah Omar v. Zainal Montel [2003] 1 LNS 501 HC ***(refd)***

Chong Swee Huat & Anor v. Lim Shian Ghee T/A L & G Consultants & Education Services [2009] 4 CLJ 113 CA ***(refd)***

A *Henry Ong Keng Sem v. Patrick Ong King Kok [2008] 4 CLJ 276 HC* ***(refd)***
Ismail Shamsudin v. Abdul Aziz Abdan [2007] 8 CLJ 65 HC ***(refd)***
Karthak v. Damai [1962] 1 LNS 65 HC ***(refd)***
Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***
Luk Kai Lam v. Sim Ai Leng [1978] 1 LNS 110 FC ***(refd)***
B *Matchplan (Malaysia) Sdn & Anor v. William D Sinrich & Anor [2004] 1 CLJ 810 CA* ***(refd)***
M Prabhakaran v. Salam Seran [2001] 3 CLJ 615 HC ***(refd)***
Rajagopal v. Rajan [1971] 1 LNS 117 FC ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
C

Legislation referred to:
Rules of the High Court 1980, O. 78 r. 3

For the plaintiff - Wan Idi Amin (P Sevam with him); M/s Adliza Subra & Partners
For the defendants - Joy W Appukuttan; M/s SK Yeoh & Partners
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Reported by Kumitha Abdul Majid

JUDGMENT

E

Abdul Wahab Patail J:

[1] The plaintiff Subramaniam a/l Paramasivam, a barrister and solicitor, claims damages against the defendants, Courts Mammoth Berhad and Nicholas Alexander Elphick for defamation. The defendants
F were the plaintiff's former clients.

[2] There are three initial elements to an action in defamation. The first is whether the words by their natural and ordinary meaning (see *Chong Swee Huat & Anor v. Lim Shian Ghee T/A L & G Consultants & Education Services* [2009] 4 CLJ 113) or by innuendo (*Rajagopal v. Rajan* [1971] 1 LNS 117; *Luk Kai Lam v. Sim Ai Leng* [1978] 1 LNS 110) is
G capable of being defamatory. The second is whether the words refer to the plaintiff. The third is whether the words were published to a third party. See *Henry Ong Keng Sem v. Patrick Ong King Kok* [2008] 4 CLJ 276; *Ismail Shamsudin v. Abdul Aziz Abdan* [2007] 8 CLJ 65; *Kian Lup*
H *Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32. Only if these elements are established, then it can be said that *prima facie* the words are defamatory of the plaintiff. Only then would it become necessary to consider the defences and the plaintiff's answers thereto.

I **[3]** The claim is premised on words or innuendos contained in: (a) the 1st defendant's solicitor's letter of termination dated 17 February 2003, and (b) the 1st defendant's letter of complaint against the plaintiff to the Advocates & Solicitors Disciplinary Board dated 16 April 2004.

[4] In the letter of termination, the offending words were: "Any and all money paid by courts to you with respect to the "226 Files" which has been wrongfully apportioned, appropriated and/or expended."

[5] In the letter of complaint, the plaintiff takes exception to the following words:

> 3. Nature of Misconduct
>
> COURTS believes that Mr Subramaniam is guilty of misconduct pursuant to s. 94(3) of the Legal Profession Act 1976 for the reason set out below:
>
> 3.1. Refusing to provide COURTS with the status reports and statements of account
>
> (c) Payment of money by COURTS
>
> Pursuant to the abovementioned bills/invoices, COURTS paid a total of RM655,77.00 to Mr Subramaniam and/or Messrs Adliza Subra And Partners as follows:
>
> (d) Refusal to provide status report or statement of accounts
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> Notwithstanding COURTS' various request and demands, Mr Subramaniam failed and refused to do the following:
>
> (i) Failed and refused to provide COURTS informed of the various Matters.
>
> (ii) Failed and refused to provide accounts showing how money paid by COURTS have been apportioned, Subramaniam and/or Messrs Adfiza Subra And Partners.
>
> (e) Demand for Status Report & Statement of Account
>
> COURTS did through its solicitors' letter dated 22 May 2003 demand from Mr Subramaniam and Messrs Adliza Subra And Partners a written and complete status report of all Matters ("Status Report") and a written and complete account of all money paid by COURTS to and received by Mr Subramaniam and Messrs Adliza Subra & Partners ("Statement of Account").
>
> (i) Instead of providing the status report and statement of account, Mr Subramaniam and/or Messrs Adliza Subra and Partners did *via* letters 26 May 2003, 29 May 2003 and 15 July 2003 refund RM8,246.00 to COURTS. The particulars of the refund are sent out in Folio 3 of the amended SOC (the relevant documents are found in the Complaint's Documents-Bundle C).

(ii) Thereafter, Mr Subramaniam and/or Messrs Adliza Subra And Partners, did *via* a letter dated 20 August 2003 refund a further sum of RM422.50 to COURTS.

(f) Continued refusal to provide status report or statement of accounts

However, Mr Subramaniam and/or Messrs Adliza Subra And Partners continue to fail and refuse to provide COURTS with the status report and statements of account.

3.2. Failure to exercise due diligence and/or provide proper legal service

(a) Wrongful conduct of court proceeding. Mr Subramaniam and/or Messrs Adliza Subra & Partners has filed a suit for and on behalf of COURTS in Johor Bahru Magistrate's Court with A/E No: 76-387-2001 against one Norashikin binti Radzali.

(i) Suddenly, by a letter dated 28 May 2003, Mr Subramaniam informs COURTS that the above suit has been discontinued or withdrawn "at the advice of the court", (refer: Messrs Adliza Subra & Partners' letter dated 28 May 2003 set out in Complainant's Documents, Bundle C)

(ii) Mr Subramaniam and/or Messrs Adliza Subra & Partners, have since failed and refused to explain the following:

– Why did a court of law advice lawyer with conduct to discontinue or withdraw the above matter?

– Why did a lawyer with conduct discontinue or withdraw the above matter without COURTS's approval, consent and instructions?

(b) Failure to provide any or any proper legal services

Notwithstanding that Mr Subramaniam and/or Messrs Adliza Subra & Partners were appointed in 1999, they have never informed COURTS of even one single successful prosecution of Writ Seizure & Sales.

3.3. COURTS is denied information & knowledge of its own matters

By reason of Mr Subramaniam and/or Messrs Adliza Subra & Partners continued failure and refusal to provide the status report and statement of account, COURTS has no updated information and knowledge of its own matters.

> By reason of all the above, COURTS believes that Mr Subramaniam has breached his duties and obligations to COURTS and is guilty of misconduct unbefitting of an advocate and solicitor, or which brings or is calculated to bring the legal profession into disrepute pursuant to s. 94(3)(o) of the Legal Profession Act 1976.

[6] The words in the letter of termination and the letter of complaint do not speak well of the plaintiff. The words, if pertaining to a person's reputation as an advocate and solicitor, a profession that demands of its members a reputation of integrity, particularly with regard to financial interests of their clients, is scandalous in nature. In the letter of termination, the words "wrongfully apportioned, appropriated and/or expended" were used in relation to money. In the letter of complaint, the allegations were of refusal to provide status reports and statement of accounts, and extended to his conduct and practice which are wholly inappropriate of an advocate and solicitor and if accepted would expose him to disciplinary action. The words and innuendos are clearly capable of being defamatory.

[7] In both instances, the plaintiff is referred to by name. There is no suggestion the name was intended to refer to anyone else. There is no doubt the words refer to the plaintiff. It is not disputed the plaintiff is an advocate and solicitor. The words are, therefore, defamatory in nature of the plaintiff as an advocate and solicitor.

[8] As to publication, the letter of termination was addressed to the plaintiff while the letter of complaint was addressed to the Director, Complaints Secretariat of the Advocates & Solicitors' Disciplinary Board.

[9] With written communications it is inevitable that the staff of the sender and staff of the recipient would see the letter. However, even though such staff may not be directly involved in the writing and posting of the letter as well as the receipt and transmission to the recipient, they are nevertheless as staff are integral parts and parcel of the internal organisation. This court holds such staff are not third parties within the meaning of publication of an alleged defamation.

[10] In respect of the letter of termination, this court likewise holds that there had been no publication to a third party where the letter is read by staff of the plaintiff. Without publication to a third party, there is no cause of action in defamation (see *Matchplan (Malaysia) Sdn & Anor v. William D Sinrich & Anor* [2004] 1 CLJ 810).

[11] The letter of complaint was written by the defendants to the Advocates & Solicitors Disciplinary Board. There is *prima facie* therefore publication to a third party.

[12] The Advocates & Solicitors Disciplinary Board is, however, the body to whom complaints by their client about the professional conduct of an advocate and solicitor is by law referred to. The letter of complaint is thus a communication which is precisely within the occasion explained by the Supreme Court in *S Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233.

> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v. Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v. Bush* [1885] 5 E & B 348, 119 ER 509. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential: *Adam v. Ward* [1917] AC 309, 334.

[13] The defence of qualified privilege was pleaded by the defendants. The defence of qualified privilege was explained by the Supreme Court in *S Pakianathan v. Jenni Ibrahim (supra)* as follows:

> The protection afforded by the law to a publication made on an occasion of qualified privilege is not an absolute protection but depends on the honesty of purpose of the person who makes the publication. If he is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to reply on the privilege, in order to succeed the plaintiff has to prove express malice on the part of the defendant broadly speaking, express malice means malice in the popular sense of or desire to injure the person who is defamed. To destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication.

[14] Order 78 r. 3 of the Rules of the High Court 1980 operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must serve a reply giving particulars of the facts and matters from which malice is to be inferred. There are two reasons for this. Firstly, malice negates the defence of privilege. Secondly, since malice is an indirect fact, a finding of fact based upon inferences or conclusions from other facts that are indicative of malice, the particulars of such facts as are relied upon must be disclosed so as to estop the defendant from claiming he was taken by surprise, and seek the answer of malice to the defence to be dismissed since the burden of proof of malice is upon the plaintiff.

[15] The reason for such estoppel is that if the particular facts relied upon have not been set out, the defendant would have had no opportunity to verify the truth and accuracy of those particular facts, and if not true and correct, in what manner it is not true and not correctly stated.

[16] These steps are simple. To the impatient, they may be tedious. But it is a mistake to ignore them. It is a costly mistake since notice and opportunity to check and verify is central to the ability of procedure in civil litigation to ensure that the decision of the court is fair and just by making sure decisions are based upon facts:

(i) that are acknowledged by the parties to be true and correct; and

(ii) where any fact is disputed, the finding of fact is made upon evidence that are acknowledged to be authentic or if disputed as to authenticity, upon evidence that has been disclosed, giving the other party opportunity to check and verify its authenticity, and therefore able to say whether the evidence may be admitted into evidence, or if he does not, the reasons why that evidence should not be admitted into evidence.

[17] It is the reasons why a piece of evidence should not be admitted into the body of evidence and to be taken into consideration that will determine if only submissions are necessary, or if it is necessary first for the trial judge to examine witnesses assisted by examination-in-chief, cross-examination and re-examination by counsels to present and test the witness, to determine whether the evidence of the witness is not unsafe to rely upon and the weight to be given, before proceeding to submissions and decision.

[18] It is a common error to overlook (a) disclosure of particulars of facts which would pre-empt argument of being taken by surprise and, therefore, not afforded the opportunity to answer; (b) checking and verification of disclosed particulars before trial to avoid unnecessary dispute and minimise trial time and costs; (c) disclosure of evidence relied upon in respect of disputed facts being pursued to pre-empt argument by the other party he had no opportunity to check and verify the evidence; and (d) checking and verifying evidence disclosed as to authenticity, reliability and accuracy. These steps are the litigants' and their counsels' best weapons to ensure that the decision of the court is as far as is humanly possible firmly based upon facts that they are satisfied with are true and correct, and if any fact is disputed, the finding of fact is made upon evidence that the parties are satisfied as to

authenticity or found by the court to be authentic on the basis of consideration of submissions thereon by counsel who are fully prepared, and thereby ensure fair and just decisions by a process of reasoning rather than by unpredictable chance, choice, preference or belief.

[19] The plaintiff, in this case, had failed to file a reply to the statement of defence. He had failed to put together a plea of malice as an answer to the defence of privilege as required by O. 78 r. 3. Instead, the plaintiff makes do by reliance upon para. 18 of the Statement of Claim, wherein he had alleged malice. The plaintiff relied upon *Luk Kai Lam v. Sim Ai Leng* [1978] 1 LNS 110.

[20] Looking at para. 18 of the statement of claim, it is clear that while the word malice was used, no particulars of facts relied upon from which a finding of malice may be inferred or concluded had been set out. There is no basis to distinguish *M Prabhakaran v. Salam Seran* [2001] 3 CLJ 615 and *Abu Samah Omar v. Zainal bin Montel* [2003] 1 LNS 501, or to apply *Luk Kai Lam v. Sim Ai Leng (supra)*. The effect of O. 78 r. 3 is to require particulars of malice to be pleaded so that the truth and correctness of the particulars relied upon can be checked and verified.

[21] The court finds that the plaintiff has failed to invoke successfully malice as an answer to the defence of privilege.

[22] That is not to say that there is no need for the defendant to establish the defence of qualified privilege. But without the answer of malice being raised successfully, the complaint by the client of an advocate and solicitor to the Advocates & Solicitors Disciplinary Board, is not shown to be other than a privileged communication by a client with a grievance about the legal services he had been provided, ie, a person who has an interest or a duty, legal, social or moral to make it to the body that has a corresponding interest or duty to receive it. See *Karthak v. Damai* [1962] 1 LNS 65.

[23] In this case, the complaint was dismissed by the Advocates & Solicitors Disciplinary Board. On 11 March 2005, the Advocates & Solicitors Disciplinary Board issued a letter as follows:

> The Disciplinary Board has considered your complaint against the above respondent and has at its meeting held on 5 March 2005 determined that there is no merit in your complaint. Accordingly, the board has dismissed your complaint.
>
> You may, if dissatisfied with this decision of the board, appeal to the High Court of Malaya within 30 days from the date of this notice.

[24] There is no assertion or evidence of an appeal from the decision of the Advocates & Solicitors Disciplinary Board. It was submitted for the defendants that even if the Disciplinary Board had dismissed the complaint made to it, this does not mean that the words mentioned therein are not justified because the very fact that the court in the S6-22-1191-2003 action made the order for account and subsequent orders to refund the money is sufficient proof the complaint to the Advocates & Solicitors Disciplinary Board is (a) not done with malice and (b) is justified.

[25] The issue here is whether the law recognises a cause of action in defamation in cases where a complaint made to a professional disciplinary authority is dismissed. The threat of litigation would intimidate persons with *bona fide* complaints from making a complaint, and deny the public their right of protection from unprofessional professionals. That is a far greater harm to the public interest than to professionals having to defend themselves in a disciplinary forum of their peers for the reason that by taking up their profession they have not only offered to provide professional services to the public, but also submitted themselves to the authority of the disciplinary authority of their profession in respect of dissatisfaction. This court holds there is no cause of action in these instances where the complaint made is *bona fide*.

[26] In this case, there is evidence before the court of many requests made for information and accounts. The plaintiff has not shown he had answered each and every inquiry made by the client. The plaintiff had been tardy. Status reports were alleged to have been produced. The defendants submitted that they had not seen these reports. There is no evidence produced before the court to show that these reports were delivered to the defendants at the material times to dismiss categorically those assertions. A bad taste remains. Closer examination show that the status reports now produced were for Ipoh, Penang and Alor Star, and do not address the locations and cases which are the subject of grievances in the defendants' complaint to the Advocates & Solicitors Disciplinary Board. It is not demonstrated the status reports were not incomplete. The defendants' outburst of complaint reflects the defendants' fears as a party, not only not convinced they kept informed but felt the information was being kept from them. The plaintiff may feel or maintain it was excessive, but an objective view is that it was, in all the circumstances, not unreasonable. There is no evidence adduced of any other motive as would raise for consideration the principle in *Abdul Aziz bin Jelani & Anor v. Peter Chua Swee Lai* [2000] 2 CLJ 402 where KC Vohrah J held:

> The defamer is entitled to the protection of privilege if he can prove the positive belief or honest belief in the truth of what he published. In the present case, the court found that the defendants in publishing

A the defamatory statement did not believe the statement to be true. They merely wanted the assistance of the police to get the plaintiff to explain to them the receipt, it was a misuse of the process conclusive evidence of express malice on the part of the defendants. The defence of privilege was properly rejected by the Sessions Court.

B **[27]** Other than that of the complaint being dismissed, there is no evidence put before the court to suggest the defendants did not believe their own complaint and was misusing the complaint procedure to the Advocates & Solicitors Disciplinary Board for any other ulterior motive. The court concludes that the complaint to the Advocates & Solicitors C Disciplinary Board remained *bona fide* at the time it was made, and provides no cause of action by its dismissal.

[28] Further, the court finds that even though the plaintiff now admits he kept the sum of RM227,137.93 of the 1st defendant's money, the plaintiff had not disclosed he had the sum at any time prior to and even D before the Advocates & Solicitors Disciplinary Board.

[29] In the event, the court holds the defendants did have a *bona fide* grievance at the time the letter of termination and the letter of complaint were issued.

E **[30]** In the light of the above, it is unnecessary to consider the defence of justification.

[31] The plaintiff's claim is dismissed with costs.

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